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PP

v.

NORMAN ISMAIL

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COURT OF APPEAL, PUTRAJAYA
LOW HOP BING JCA
SURIYADI HALIM OMAR JCA
ZAINUN ALI JCA
[CRIMINAL APPEAL NO: B-05-21-2008]

C

27 JUNE 2008

CRIMINAL PROCEDURE: *Arrest - Remand order - Appeal against acquittal of accused - Whether accused ought to be remanded to prison pending disposal of prosecution's appeal - Balance of justice - Courts of Judicature Act 1964, s. 56A*

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CRIMINAL PROCEDURE: *Appeal - Acquittal, against - Remand order - Whether accused ought to be remanded to prison pending disposal of prosecution's appeal - Balance of justice - Courts of Judicature Act 1964, s. 56A*

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This was an application by the prosecution under s. 56A of the Courts of Judicature Act 1964 ('CJA') seeking a warrant directing that the respondent/accused be arrested and brought before this court, so as to remand him to prison pending the disposal of the

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prosecution's appeal by this court. The accused, charged in the High Court with the offence of drug trafficking under s. 39B(1)(a) of the Dangerous Drugs Act 1952, was acquitted and discharged at the close of the prosecution's case without his defence being called. The question that arose for determination was: Where an

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accused has been acquitted and discharged of an offence punishable by death, and who is a foreigner without any travel documents, is it just and proper for the Court of Appeal to invoke s. 56A of the CJA and issue a warrant directing that the accused be arrested and brought before it, and remand him to prison

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pending the disposal of the prosecution's appeal against the acquittal?

Held (allowing the application)
Per Low Hop Bing JCA delivering the judgment of the court:

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(1) The purpose of s. 56A of the CJA is clearly to empower the prosecution to appeal against an acquittal ordered by the High Court. By way of corollary, it is intended to preserve the

integrity of the prosecution's appeal. The amendment expressed in s. 56A of the CJA serves the specific purpose of ensuring that the right of the prosecution to appeal is not rendered academic or nugatory as a result of the absence or non-attendance of an accused who has been acquitted by the High Court. It is intended to facilitate a full hearing of the appeal on its merits so that justice is not only done to the accused but also to the public and the State. In the instant case, since the accused was a foreigner without any travel documents and without any fixed or proper place of abode, it was undesirable and indeed eminently unsuitable for him to be released on bail as he may avail himself of the opportunity to abscond, thereby defeating the ends of justice. On the foregoing grounds, the balance of justice lay in favour of a remand order. The answer to the above question was thus in the affirmative. Meanwhile, the balance of justice would be placed in equilibrium by ordering an expeditious and speedy disposal of the prosecution's appeal. Therefore, this court ordered that an early date be fixed for the hearing and disposal thereof. (paras 30, 31, 32, 33, 34 & 35)

Bahasa Malaysia *Translation Of Headnotes*

Ini adalah permohonan oleh pendakwaan di bawah s. 56A Akta Mahkamah Kehakiman 1964 ('CJA') untuk mendapatkan waran bagi menahan dan membawa responden/tertuduh ke mahkamah dan meremankannya di penjara sehingga rayuan pendakwaan dilupuskan oleh mahkamah ini. Tertuduh, yang dituduh di Mahkamah Tinggi di bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952 kerana mengedar dadah, telah dilepas dan dibebaskan di akhir kes pendakwaan tanpa pembelaannya dipanggil. Soalan yang berbangkit untuk pemutusan adalah: Di mana seorang tertuduh telah dilepas dan dibebaskan dari satu kesalahan yang boleh dihukum dengan hukuman mati, dan orang itu pula seorang rakyat asing yang tidak mempunyai sebarang dokumen perjalanan, adakah wajar dan adil bagi Mahkamah Rayuan untuk menggunapakai s. 56A CJA sekaligus mengeluarkan waran mengarahkan supaya tertuduh ditangkap dan dibawa ke hadapannya, dan supaya ia direman di penjara sementara menunggu keputusan rayuan pendakwaan terhadap pembebasannya itu?

Diputuskan (membenarkan permohonan)
Oleh Low Hop Bing HMR menyampaikan penghakiman mahkamah:

(1) Tujuan s. 56A CJA jelasnya adalah untuk membenarkan pendakwaan untuk merayu terhadap pembebasan yang dibuat oleh Mahkamah Tinggi. Sehubungan itu, ia juga bermaksud untuk melindungi integriti rayuan pendakwaan. Pindaan yang dinyatakan pada s. 56A adalah khusus untuk mempastikan bahawa hak pendakwaan untuk merayu tidak menjadi akademik atau sia-sia akibat ketiadaan atau ketidakhadiran tertuduh yang telah dibebaskan oleh Mahkamah Tinggi. Ia bermaksud untuk membantu perbicaraan penuh rayuan pada meritnya, sekaligus mempastikan keadilan bukan sahaja ditegakkan terhadap tertuduh tetapi juga terhadap orang awam dan Kerajaan. Dalam kes semasa, oleh kerana tertuduh seorang orang asing dan tidak memiliki dokumen perjalanan serta tidak mempunyai tempat tinggal yang tetap, maka adalah tidak kena dan amat tidak wajar untuk beliau dilepaskan dengan jaminan kerana beliau mungkin akan mengambil peluang untuk melarikan diri sekaligus mensia-siakan maslahat keadilan. Atas alasan-alasan ini, imbangan keadilan adalah berpihak kepada suatu perintah reman. Oleh itu jawapan kepada soalan di atas adalah berbentuk afirmatif. Di samping itu, neraca keadilan akan berada pada kedudukannya yang seimbang dengan memerintahkan rayuan pendakwaan dilupuskan dengan secepat mungkin. Oleh yang demikian, mahkamah memerintahkan supaya satu tarikh awal diberikan untuk pendengaran dan pelupusan rayuan.

Case(s) referred to:
Balasingam v. PP [1959] MLJ 193 ***(refd)***

Legislation referred to:
Rules of the Court of Appeal 1994, r. 58(3), (4)
Courts of Judicature Act 1964, s. 56A
Courts of Judicature (Amendment) Act 1976, s. 8
Courts of Judicature (Amendment) Act 1994, s. 16(b)
Dangerous Drugs Act 1952, s. 39B(1)(a), (2)
Evidence Act 1950, s. 114(g)
Interpretation Acts 1948 and 1967, s. 17A

For the appellant - Nurulhuda Nur'aini Mohamed Nor DPP
For the respondent - Himself

Reported by Suresh Nathan

JUDGMENT

Low Hop Bing JCA

Notice Of Motion

[1] Before us is the prosecution's application by way of notice of motion under s. 56A of the Courts of Judicature Act 1964, seeking a warrant directing that the respondent ("the accused") be arrested and brought before this court so as to remand him to prison pending the disposal of the prosecution's appeal by this court.

Factual Background

[2] This has been set out in the affidavit in support affirmed by the learned deputy public prosecutor Ms. Nurulhuda Nur'aini bt. Mohamed Nor.

[3] The accused was charged in the Ipoh High Court with an offence of drug trafficking under s. 39B(1)(a) of the Dangerous Drugs Act 1952, punishable under s. 39B(2) of the same Act.

[4] The accused was represented by counsel in the High Court.

[5] On 29 January 2008, at the close of the prosecution's case, the learned trial judicial commissioner acquitted and discharged the accused without calling for defence.

[6] On the basis of the evidence adduced for the prosecution at the trial, the affidavit in support averred that:

(a) On 20 May 2001, at about 8.30pm, SP5 together with his police party kept watch on the road leading to Kampung Tersusun, Tronoh Mines, in the district of Kinta, in the state of Perak;

(b) At about 9pm, SP5 saw four men, including the accused, walking from Kampung Tersusun towards the direction of the Ipoh-Lumut trunk road. Some 10 minutes later, the accused was seen walking from a food stall towards Kampung Tersusun. Five minutes later, the accused was seen carrying a bag in his left hand and walking from Kampung Tersusun towards the direction of the Ipoh-Lumut trunk road;

A (c) When the accused arrived at the place where SP5 and his police party were based, he was detained by SP5. On checking the bag carried by the accused, SP5 recovered five slabs of substances which, upon analysis, were found to contain 4973gm of cannabis; and

B (d) SP5 and his police party also arrested the other three men and detained their Indonesian passports as well. However, they were subsequently released, as nothing incriminating was found on them.

C **[7]** On 29 January 2008, in an oral judgment, the trial court acquitted and discharged the accused on the basis of s. 114(g) of the Evidence Act 1950, holding that the prosecution's failure to call the three Indonesians had caused a break in the chain of evidence in the prosecution's case;

D **[8]** The accused is apparently an Indonesian without any travel document. He has since 18 February 2008 been detained by the Perak Immigration Department at the Langkap Immigration Depot.

E **[9]** Upon the prosecution's application on an *ex parte* basis, this court issued a warrant of arrest against the accused on 28 February 2008.

[10] The warrant was executed on 29 February 2008 and he was F brought before this court on the same date.

[11] Pending the disposal of the prosecution's appeal, the prosecution has now filed this application for an order to remand the accused to prison.

G **Section 56A, Courts Of Judicature Act 1964**

[12] In urging the court to order the remand of the accused, the prosecution submitted that the accused's presence at the hearing of the appeal is essential; otherwise the appeal would be rendered H academic or nugatory.

[13] The accused was not legally represented at the hearing of this application. However, he did not dispute the fact that he is an Indonesian without any travel document and that he is now brought before this court on the warrant.

I **[14]** In my judgment, the question that arises for determination herein may be stated as follows:

> Where an accused has been acquitted and discharged of an offence punishable with death sentence, and is a foreigner without any travel document, is it just and proper for the Court of Appeal to invoke s. 56A of the Courts of Judicature Act 1964 and to issue a warrant directing that the accused be arrested and brought before it and to remand him to prison pending the disposal of the prosecution's appeal against the acquittal?.

[15] So far as I am aware, this question appears to be the first of its kind to be determined by this court. The significance is self-evident. It revolves around the resolution of the competing interest of the accused and that of the prosecution representing the public and hence the State. One end of the scale shows the fundamental liberty of the accused, while the other end reveals the preservation of the integrity of the prosecution's appeal.

[16] The answer to the above question requires a careful consideration of s. 56A as well as r. 58(3) and (4) of the Court of Appeal Rules 1994. ("r. 58(3) and (4)").

[17] Section 56A merits reproduction as follows:

> **On appeal against acquittal, accused may be arrested**
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> 56A – Where an appeal is presented against an acquittal, the Court of Appeal may issue a warrant directing that the accused be arrested and brought before it and may remand him to prison pending the disposal of the appeal or admit him to bail.

[18] Section 56A was inserted by s. 8 of the Courts of Judicature (Amendment) Act 1976 (Act A328). Pursuant to s. 16(b) of the Courts of Judicature (Amendment) Act 1994 (Act A886), the words "Court of Appeal" were subsequently included in place of the previous "Supreme Court".

[19] Rule 58(3) and (4) where relevant read:

> 58(3). As soon as Notice of Appeal is filed by the Public Prosecutor as in subrule (1), the Court of Appeal may on an application by the Public Prosecutor issue a warrant directing that the accused be arrested and brought before it and may remand him to prison pending the disposal of the appeal or admit him to bail in accordance with the provisions of s. 56A of the Court of Judicature Act 1964.
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> (4) The application under subrule (3) may be made by motion *ex parte* … .

[20] Section 56A contains substantive provisions conferring upon this court the discretionary power to issue a warrant directing that the accused be arrested and the consequential order of either to remand the accused to prison or admit him to bail. This new section applies upon the prosecution filing an appeal against an acquittal.

[21] Rule 58(3) and (4) set out the procedural law pursuant to which the prosecution may move this court by way of notice of motion, such as in the instant application.

[22] Upon dealing with the prosecution's application:

(a) This court is empowered to issue a warrant against the acquitted accused; and

(b) On the execution of the warrant, the accused shall be brought before this court, and this court may either:

(i) remand the accused to prison; or

(ii) admit him to bail.

Warrant Of Arrest

[23] As the prosecution has on 28 February 2008 applied *ex parte* and obtained a warrant against the accused under s. 56A read with r. 58 (3) and (4) and that warrant has been executed on 29 February 2008, this court is only required to consider the second stage of s. 56A ie either to remand the accused to prison or admit him to bail.

Remand Or Bail?

[24] The consideration of the order for remand or bail requires the construction of the second limb of s. 56A. This court has to exercise the discretion judicially and according to established judicial principles, having regard to all the facts and circumstances prevailing in each particular case.

[25] Although the exercise of discretion by this court is not unprincipled, it is impossible and impracticable to set out a rigid formula in this regard.

[26] As a general rule, when an accused has been acquitted by the High Court, he remains a free man and every effort should be made to give effect to the order.

[27] However, this general rule must now be read in conjunction with the provisions of s. 56A as alluded to above. It is the duty of this court to ascertain the intention of Parliament as expressed in s. 56A.

[28] Section 17A of the Interpretation Acts 1948 and 1967 provides as follows:

> **Regard to be had to the purpose of Act**
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> 17A. In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose of object.

[29] The purpose of enacting s. 56A may be discerned from the explanatory statement to the Court of Judicature (Amendments) (No 2) Act 1975 Bill. The relevant portion of this explanatory statement reads as follows:

> This Bill seeks to amend the Courts of Judicature Act, 1964 ... for the following purposes:
>
> (a) ...
>
> (b) to empower the Public Prosecutor to appeal to the Federal Court against any decision made by the High Court in the exercise of its criminal jurisdiction at first instance;

[30] The purpose of s. 56A is clearly to empower the prosecution to appeal against an acquittal ordered by the High Court. By way of corollary, it is intended to preserve the integrity of the prosecution's appeal.

[31] The amendment expressed in s. 56A serves the specific purpose of ensuring that the right of the prosecution to appeal is not rendered academic or nugatory as a result of the absence or non-attendance of an accused who has been acquitted by the High Court. It is intended to facilitate a full hearing of the appeal on its merits so that justice is not only done to the accused but also to the public and the State.

[32] It needs to be noted that an appeal is a continuation of a trial; see eg, *Balasingam v. PP* [1959] MLJ 193 HC: per Ismail Khan J (later CJ(B)).

[33] The integrity of the prosecution's appeal can only be preserved if the accused is placed in such a position as to conduce to the hearing and determination of the appeal in due course, which can never be realized in the absence or non-attendance of the accused. Hence, s. 56A must be construed so as to promote that purpose

[34] As the accused is a foreigner without any travel document and without any fixed or proper place of abode, it is undesirable and indeed eminently unsuitable for him to be released on bail as he may well avail himself of the opportunity to abscond, thereby defeating the ends of justice.

Conclusion

[35] On the foregoing grounds, I hold that the balance of justice lies in favour of a remand order. The answer to the above question is in the affirmative. Hence, I allow the application and make an order that the accused be remanded in prison pending the disposal of the prosecution's appeal by this court. Meanwhile, the balance of justice will be placed in equilibrium by ordering an expeditious and speedy disposal of the prosecution's appeal. I therefore order that an early date be fixed for the hearing and disposal thereof.

[36] My learned brother, Suriyadi Halim Omar, JCA and my learned sister Zainun binti Ali, JCA have read this judgment in draft and have expressed their agreement to make it the judgment of the court.